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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ANDREW HERMINIO GOMEZ, Defendant and Appellant.	G051228 (Super. Ct. No. 13ZF0173) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kimberly K. Menninger, Judge. Affirmed.

Denise M. Rudasill, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Christine Levingston Bergman, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Andrew Herminio Gomez of assault with force likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(4))[1] and found he committed the crime for the benefit of the Mexican Mafia (§ 186.22, subd. (b)(1)). The court sentenced him to prison for five years.

On appeal defendant contends the court erred by allowing a gang expert to rely on, and describe in detail to the jury, an inmate note (also known as a "kite") and three jailhouse phone calls in forming and expressing his opinion that defendant committed the assault for the benefit of the Mexican Mafia.

Defendant is correct that the court erred by allowing the gang expert to rely on the phone calls. (*People v. Sanchez* (2016) 63 Cal.4th 665, 686 (*Sanchez*).) But with respect to the kite, defense counsel never lodged an objection to its admission into evidence on hearsay grounds. Consequently, because the expert properly used the kite, the court's error with respect to the phone calls was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Accordingly, we affirm the judgment.

FACTS

On October 1, 2012,[2] four inmates (Adrienne Ramirez, Octavio Duarte, Joshua Garcia, and defendant) assaulted inmate Guadalupe Hernandez in a jail dayroom. A deputy sheriff witnessed the assault and reviewed surveillance video of it. The deputy subsequently spoke to defendant. Defendant stated he participated in the fight because "Hernandez had been looking at him" and defendant's "emotions got the best of him."

On October 1 (just minutes before the assault), October 4 (three days after the assault), and October 15 (14 days after the assault), Hernandez made jailhouse phone

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[1] All statutory references are to the Penal Code unless otherwise stated.

[2] All dates refer to the year 2012.

calls to an unknown male. On October 23 (22 days after the assault), two deputies found a kite (the October 23 kite) during a random search of an inmate's cell in a maximum security housing area.

At a pretrial hearing, defense counsel moved to exclude as inadmissible hearsay the three phone calls made by Hernandez from the jail. The prosecutor clarified he was *not* offering the phone calls for the truth of the matter. The court ruled the gang expert could use the phone calls as the basis for his opinion and that the calls could be played (or read) to the jury in conjunction with a limiting instruction.

At that same hearing, defense counsel moved to exclude the October 23 kite under Evidence Code section 352 and for "lack of foundation that it has anything to do with this case." The prosecutor stated the kite was "circumstantial evidence of a conspiracy." The court ruled the kite was admissible, after conducting an Evidence Code section 352 balancing.[3]

At trial, two gang experts — Rene Enriquez and Seth Tunstall — testified for the prosecution as follows.

Rene Enriquez's Testimony

Enriquez, a former member of the Mexican Mafia (Mafia),[4] testified that the Mafia imposes a hierarchy on Hispanic inmates in the jail system. At the top of the

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[3] A caption in defendant's opening brief contends the court erred by admitting the kite and "the expert's testimony based upon this 'kite' . . . ." But the opening brief contains no discussion or analysis of whether the court abused its discretion by substantively admitting the kite into evidence for the truth of the matter as relevant circumstantial evidence of a conspiracy. Accordingly, defendant has waived any such argument (Cal. Rules of Court, rule 8.204(a)(1)(B)), and we address only his argument the court erred by allowing the gang expert to rely on the kite and describe it to the jury.

[4] At the time of defendant's trial, Enriquez was a "confidential human source" for the Federal Bureau of Investigation and the Bureau of Alcohol, Tobacco, Firearms and Explosives, specializing in evaluating gang communications. He was

hierarchy are the Mafia members. Next, each jail is run by a "Mesa," an ad hoc commission of "shot callers" appointed by Mafia members, who use a roll call list to locate individuals, deliver messages, and effectuate orders. Beneath the shot callers are the "sureños." A sureño is a member of a southern California Hispanic gang who has professed his loyalty to the Mafia and has volunteered to serve as a soldier for the Mafia and to commit violence.

The Mafia "taxes" gang members and drug dealers, both inside and outside of jail, as a way to raise money. An individual who fails to pay a tax assessed by the Mafia, or who breaks the Mafia's rules, is typically placed on a "green light" list. A group, such as an entire gang, can also be green lighted. A green lighted person or group is targeted by all other gangs and individuals in alliance with the Mafia, both in jail and out on the street, until the debt is paid. The designation, "on sight," on the green light list means the person or group must be assaulted at the first opportunity, even in the presence of law enforcement.

A Mafia "shot caller" orders sureños to take action against a listed person. Before a sureño can assault someone, he must get permission from a shot caller, or risk being targeted for assault himself.

One method used by the Mafia to communicate its orders is via "kites," which are notes written by inmates and passed from prisoner to prisoner until they reach their destination. Kites are the best vehicle for informing other inmates of a green light list. Kites are often copied and distributed on each floor and in each module of the jail, so that everyone knows who is on the lists.

In response to a hypothetical question based on the facts of this case, Enriquez opined that the hypothetical assault would be authorized by the Mafia because multiple inmates (at least three of whom were members of divergent gangs) assaulted a

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serving two life sentences for murder and one life sentence for conspiracy to commit murder.

member of a different gang, which denotes a lack of spontaneity and some level of planning.

Seth Tunstall's Testimony

Deputy Sheriff Seth Tunstall had investigated the Mafia for the past 12 years, and had been on loan to the federal Santa Ana gang task force for almost five years. He testified that the Mafia is an active criminal street gang in Orange County, both inside and outside the jails, with between 125 to 150 members and an estimated 40,000 additional associates.

Tunstall investigated the October 1 assault to determine whether the motive was Mafia-related. He testified that Duarte, Garcia, and Ramirez (defendant's co-participants in the attack on Hernandez) admitted their involvement in the assault. Duarte is a self-admitted member of the Anaheim Southside Krooks gang. Garcia is a self-admitted member of the Fullerton Tokers Town gang. Defendant is a self-admitted member of the True Homies Clique gang. Ramirez denied gang membership, but said he "programs with southern Hispanic street gang members." The victim, Hernandez, is a self-admitted La Fabrica gang member with the moniker "Scrappy."

Tunstall testified the three jailhouse phone calls were made by Hernandez, because the caller had introduced himself as "Scrappy," a moniker held by no other inmate in the housing block (to Tunstall's knowledge). After the court read the jury a limiting instruction,[5] Tunstall described the phone calls.

On October 1, around 15 minutes before he was attacked, Hernandez made a call from the jail and said, "That shit hasn't even gone around here, fool." The

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[5] The court instructed the jury: "[Y]ou may not use this evidence to prove the truth of the facts that may be mentioned during the phone calls. You are to use this evidence for the limited purpose of possibly supporting the opinion of the gang expert and for no other purpose."

unknown male responded, "That fool wants to talk to me now. That fool, Little B." (Tunstall testified "Lil' Bogart" (Ishmael Esquivel) was running the streets for the Mafia at that time.) Later in the call, Hernandez said he spoke to the "Rep" (representative) in his barracks about who was on the list. (Tunstall interpreted this to mean that Hernandez had asked the shot caller whether La Fabrica was on the green light list.) Hernandez then said, "The Rep said[, Y]ou guys are good." "I'm like, damn. They don't even know anything." (Tunstall interpreted this to mean that Hernandez knew his gang had "messed up" and should be on the list, but for some reason, in Hernandez's barracks, La Fabrica was not on the green light list.) The call ended soon thereafter, and Hernandez was assaulted.

On October 4, Hernandez called the unknown male and said, "As soon as I hung up on you, I got bombed on, dog," which Tunstall interpreted as a reference to the October 1 assault. The unknown male asked, "Did they get you good?" Hernandez replied, "Hell no, fool, but I got a few bruises on my dome." Hernandez then said, "Yeah they found me, fool. The next day the Juras," "they picked me up and said hey, you guys are on sight." (Tunstall explained that "Juras" was slang for "cops," and interpreted these statements to mean that La Fabrica had been identified as green lighted and therefore the officers needed to move Hernandez to a different housing unit.)

During the same conversation, the unknown male said, "Hey, I told you . . . that fool, Little B," "he wants to talk to me, fool." Hernandez replied, "Get it over with." (Tunstall testified this meant Bogart wanted to talk to the unknown male about the green light, and Hernandez wanted the unknown male to handle it quickly so La Fabrica's green light could be lifted.) The unknown male said Bogart was angry because Bogart believed the unknown male was trying to "get[] at his mom," a woman involved with Mafia politics. Hernandez later said that one of his assailants was from "Krooks," a reference (in Tunstall's view) to the South Side Krooks (of which Duarte was a member). Hernandez ended the conversation by saying that, if any La Fabrica gang members were

incarcerated, they would be segregated from the regular inmate population until the green light was lifted.

In the October 15 call, the unknown male stated that "Little B [was] busted," which Tunstall interpreted as meaning that Esquivel had been arrested. Hernandez asked when this had occurred, to which the unknown male responded, "like a week ago probably" — a time period corresponding to Esquivel's actual arrest.

As to the October 23 kite, Tunstall testified it was a "typical . . . green light kite that is usually sent throughout the jail to notify the sureños of who's on the list." The kite contained the letters "G/L" for green light and listed multiple gangs, including "Fabrica," which were designated "on sight," meaning they were to be assaulted at the earliest opportunity, no matter the time or place or whether deputies were present. Tunstall explained that La Fabrica's presence on the green light list meant that the Mafia had authorized continuous assaults on La Fabrica members until their gang paid the extortion fee to the Mafia.

Tunstall opined that a hypothetical attack like the one on Hernandez (i.e., where multiple active gang members, in front of officers and on video tape, attack a victim whose gang is listed on a kite as green lighted, on sight) would be committed for the benefit of and at the direction of the Mafia, because the assault was carried out in front of many inmates and officers and was acted on swiftly and violently, and because the victim's gang was listed as green light, on sight. Tunstall believed the assault would further the criminal activity of the Mafia by helping it maintain control over its sureños and by demonstrating its willingness to use fear, force, and violence against its own.

DISCUSSION

On appeal, defendant contends the court abused its discretion (1) by allowing Tunstall to recite portions of the phone calls in detail to the jury, thereby

transforming "inadmissible hearsay into independent proof [he] was guilty of the gang enhancement," and (2) by allowing Tunstall to rely on the October 23 kite, which defendant asserts was unreliable evidence within the meaning of *People v. Gardeley* (1996) 14 Cal.4th 605, 618-619 (*Gardeley*).[6] Citing *Gardeley* at page 618, the Attorney General counters, "[E]xpert testimony may be founded on material that is not admitted into evidence and . . . that is ordinarily inadmissible, such as hearsay, as long as the material is reliable and of a type reasonably relied upon by experts in the particular field in forming opinions."

While this appeal was pending, our Supreme Court held in *Sanchez*, *supra*, 63 Cal.4th 665, that an expert witness may *not* testify to a *case-specific* out-of-court statement to explain the basis for his or her opinion, unless the statement is properly proven by independent competent evidence or is properly admitted under an applicable hearsay exception.[7] (*Id.* at p. 686.) "Case-specific" facts relate "to the particular events and participants alleged to have been involved in the case being tried" (*id.* at p. 676), as opposed to an expert's "general knowledge in his field of expertise" (*ibid.*).

In reaching this holding, *Sanchez* clarified "the proper application of Evidence Code sections 801 and 802, relating to the scope of expert testimony." (*Sanchez, supra*, 63 Cal.4th at p. 670.) "Evidence Code section 801, subdivision (b) provides that an expert may render an opinion '[b]ased on matter . . . perceived by or

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[6] Defendant further contends the court's rulings violated his due process rights. He has forfeited this argument by failing to raise it below. (*People v. Sanders* (1995) 11 Cal.4th 475, 510, fn. 3.)

[7] *Sanchez* further held that if the hearsay is testimonial, "there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Sanchez, supra*, 63 Cal.4th at p. 686.) In response to our request, the parties submitted supplemental letter briefs on the applicability, if any, of *Sanchez* to the issues presented in this case. Defendant's supplemental brief acknowledges the hearsay evidence at issue in this case is not testimonial.

personally known to the witness or made known to him at or before the hearing, *whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates* . . . .' (Italics added.) Similarly, Evidence Code section 802 allows an expert to 'state on direct examination the reasons for his opinion and the matter . . . upon which it is based . . . .'" (*Id.* at p. 678.)

Prior to *Sanchez*, some courts had "attempted to avoid hearsay issues by concluding that statements related by experts are not hearsay because they 'go only to the basis of [the expert's] opinion and should not be considered for their truth.'" (*Sanchez, supra*, 63 Cal.4th at pp. 680-681.) For example, *Gardeley* stated that "'a witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into "independent proof" of any fact.'" (*Sanchez*, at p. 683.) And, *People v. Montiel* (1993) 5 Cal.4th 877, 919, opined that hearsay problems will normally be cured by a limiting instruction, and that, in any event, Evidence Code section 352 safeguards against expert testimony on "'hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value.'" (*Sanchez*, at p. 679.)

Sanchez rejected the *Gardeley/Montiel* line of reasoning. (*Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13.) "When an expert relies on hearsay to provide case-specific facts, considers the statements as true, and relates them to the jury as a reliable basis for the expert's opinion, it cannot logically be asserted that the hearsay content is not offered for its truth. In such a case, 'the validity of [the expert's] opinion ultimately turn[s] on the truth' [citation] of the hearsay statement." (*Sanchez*, at pp. 682-683.) "Once we recognize that the jury must consider expert basis testimony for its truth in order to evaluate the expert's opinion, hearsay . . . problems cannot be avoided by giving a limiting instruction that such testimony should not be considered for its truth." (*Id.* at p. 684.) Accordingly, "[w]hen any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the

expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth." (*Id.* at p. 686.)

Sanchez rejected the Attorney General's argument "that excluding the content of testimonial hearsay would greatly hamper experts from giving opinions about gangs." (*Sanchez, supra,* 63 Cal.4th at p. 685.) Our high court stated, "Gang experts, like all others, can rely on background information accepted in their field of expertise under the traditional latitude given by the Evidence Code. They can rely on information within their personal knowledge, and they can give an opinion based on a hypothetical including case-specific facts that are *properly proven*. They may also rely on nontestimonial hearsay properly admitted under a statutory hearsay exception." (*Ibid.*, italics added.) "Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so. Because the jury must independently evaluate the probative value of an expert's testimony, Evidence Code section 802 properly allows an expert to relate generally the kind and source of the 'matter' upon which his opinion rests." (*Id.* at p. 686.) "What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Ibid.*)

Although the Court Erred By Allowing Tunstall to Rely on, and Describe for the Jury, the Phone Conversations, the Court's Admission of the Kite into Evidence was Not a Reversible Error

The three phone calls made by Hernandez were out-of-court statements. They contained the case-specific facts that (1) Hernandez's gang, La Fabrica, was green lighted, on sight; (2) Hernandez was assaulted due to the on sight green light on La Fabrica; (3) Esquivel, a high ranking person in the Mafia, was angry at a La Fabrica member or affiliate; and (4) Esquivel could cause the green light on La Fabrica to be lifted. These facts were not independently proven nor does the Attorney General contend

they come within a hearsay exception. Accordingly, the court erred by allowing Tunstall to relate these hearsay statements to the jury as true and accurate support for his opinion.

As to the October 23 kite, however, defense counsel never objected to its admission into evidence on hearsay grounds. At the Evidence Code section 402 pretrial hearing, defense counsel objected to the kite only for lack of foundation and under Evidence Code section 352.[8] Then, after the People had finished presenting their case and moved to admit their exhibits (including the kite) into evidence, defense counsel did not object. Accordingly, the court's admission of the kite into evidence was not a reversible error. (Evid. Code, § 353, subd. (a) [judgment may not be reversed for erroneous admission of evidence unless objection was timely made making clear the specific ground of the objection].)

Any Error was Harmless

The People sought to use Tunstall's expert testimony to help establish the truth of the allegation that defendant committed the assault for the benefit of, at the direction of, and in association with the Mafia. To establish the truth of a gang enhancement allegation, the People must prove that the defendant committed a felony "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (§ 186.22, subd. (b)(1).)

Due to defense counsel's failure to object on hearsay grounds to the admission into evidence of the kite, the only potentially reversible error is Tunstall's case-specific hearsay testimony describing the phone calls. Excluding that evidence about the phone calls, the facts of defendant's underlying crime revealed that he (a True

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[8] Defendant does not argue on appeal that the court abused its discretion in overruling the objections based on lack of foundation or that the prejudicial effect of the evidence outweighed its probative value under Evidence Code section 352.

Homies Clique gang member), acting together with three other inmates (a Southside Krooks gang member, a Tokers Town gang member, and a person with no gang affiliation who programmed with southern Hispanic gang members), assaulted Hernandez, a member of the La Fabrica gang, which was green lighted, on sight, in a day room visible to law enforcement. These facts constitute substantial evidence that defendant assaulted Hernandez for the benefit of, at the direction of, or in association with the Mafia, and harbored a specific intent to promote, further, or assist in criminal conduct by gang members.[9] The circumstances of the assault — in which members of three different southern Hispanic gangs, together with an inmate who programmed with southern Hispanic gang members, attacked a member of yet another southern Hispanic gang (which was green lighted on sight), in front of law enforcement, strongly suggest a Mafia-related motivation. This conclusion is supported by Enriquez's and Tunstall's testimony, based on their knowledge, training, and experience, concerning general background information on the Mafia. Enriquez testified that when a southsider arrives in jail, he is indoctrinated and taught rules by veteran Mafia members "about the ways of jail," including that a southsider must abandon gang rivalries and that before a southern Hispanic gang member may assault another southern Hispanic gang member, he must get a shot caller's permission or be targeted for assault himself. Enriquez testified that all Hispanic inmates in a southern California jail — even non-gang members — must adhere to the Mafia's rules. Enriquez further testified that the Mafia communicates its rules to southsiders and sureños through kites and other methods.

Tunstall testified he had personally viewed over a thousand kites in his experience and that the October 23 kite was "a typical hard candy/green light kite that is

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[9] As to section 186.22, subdivision (b)(1)'s requirement that the defendant have committed a gang-related felony "with the specific intent to promote, further, or assist in any criminal *conduct* by gang members" (*ibid*., italics added), such conduct can be the same gang-related crime with which the defendant is charged. (*People v. Albillar* (2010) 51 Cal.4th 47, 66, 68.)

usually sent throughout the jail to notify the sureños of who's on the list." He testified that one-on-one fights in jail may be unconnected to the Mafia, but, in his opinion, an assault by three or four gang members on a single gang member would "only happen after authorization has been given by the . . . Mafia." A jail deputy testified the October 23 kite was found during a search of an inmate's cell; that it was inside a Bible in the inmate's property box; and that the kite mentioned gang monikers and gang areas. As defendant acknowledged in his supplemental letter brief, the kite "proved that the Mexican Mafia had ordered assaults on members of the victim's gang . . . ."

Given the foregoing evidence, it is not reasonably probable defendant's result would have been more favorable absent the court's evidentiary error of admitting into evidence case-specific hearsay statements in the three phone calls made by Hernandez.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

ARONSON, ACTING P. J.

FYBEL, J.